



recurrence of disability as of April 16, 2004.<sup>2</sup> It found that the issue in her claim concerned whether the 2001 wage-earning capacity determination should be modified. The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.<sup>3</sup>

The record reveals that appellant subsequently received wage-loss compensation from January 14 to April 30, 2004. Appellant returned to work on May 1, 2004. In addition, she received schedule awards on April 3, 2008 for eight percent loss of use to both upper extremities. The period of the awards ran from May 1, 2004 to April 15, 2005.

Appellant claimed wage-loss compensation commencing November 15, 2009.<sup>4</sup> In a December 22, 2009 letter, the Office requested that she submit medical evidence in support of her claim of wage loss, specifically a narrative report from an attending physician which described her current medical condition, provided a diagnosis and opinion on how her disability related to her accepted conditions. Appellant was advised of the requirements for establishing modification of the prior wage-earning capacity.<sup>5</sup> She did not submit any medical evidence as requested.

In a February 11, 2010 decision, the Office denied modification of the 2001 wage-earning capacity determination. It found that appellant did not allege any material change in her medical condition, did not establish that the original wage-earning capacity was erroneous or that she was otherwise retrained or vocationally rehabilitated.

On February 12, 2010 appellant noted that she had been sent home and was not in receipt of compensation for wage loss. On February 28, 2010 she requested review of the written record by an Office hearing representative. Appellant contended that the 2001 wage-earning capacity determination was erroneous. The Office received medical evidence dated May through September, 4 2009 concerning therapy and a stimulator prescribed for relief of her shoulder symptoms.

In a May 17, 2010 decision, an Office hearing representative denied modification of the 2001 wage-earning capacity determination. He found that as appellant claimed wage loss since November 15, 2009, the case did not involve a brief period of temporary worsening of her condition.<sup>6</sup> Under the criteria applicable to modification of a wage-earning capacity, appellant

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<sup>2</sup> Docket No. 04-2297 (issued February 17, 2005).

<sup>3</sup> Appellant's 1998 claim of occupational disease was accepted by the Office for cervical radiculopathy at C6. She returned to work in February 1999 at limited duty and accepted a May 19, 2001 permanent limited-duty assignment. The September 6, 2001 Office decision found that appellant actual wages fairly and reasonably represented her wage-earning capacity. A January 15, 2002 claim was accepted for a right shoulder sprain and a July 21, 2002 claim was accepted for bilateral shoulder tendinitis.

<sup>4</sup> The employer noted on December 8, 2009 that appellant worked new hours as of November 16, 2009 from 10:00 p.m. to 4:30 a.m. which changed her hours of night differential from six to eight hours.

<sup>5</sup> On January 5, 2010 the employer noted that appellant was sent home because there were no modified cases and she would have been required to work outside her medical restrictions.

<sup>6</sup> See *Katherine T. Kreger*, 55 ECAB 633 (2004).

did not present evidence to establish that the permanent light-duty work she performed from 2001 to November 2009 was an odd-lot or make-shift position.

### **LEGAL PRECEDENT**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents an employee's ability to earn wages.<sup>7</sup> Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not actual wages lost.<sup>8</sup> Compensation based on a wage-earning capacity determination remains undisturbed until properly modified.<sup>9</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.<sup>10</sup> The burden of proof is on the party attempting to establish that the award should be modified.<sup>11</sup> Office procedures provide that when the employing establishment has withdrawn a light-duty assignment which accommodated the employee's work restrictions and a formal wage-earning capacity decision has issued, it will remain in place unless one of the three accepted reasons for modification applies.<sup>12</sup>

### **ANALYSIS**

Appellant did not allege or submit medical evidence to show that a material change in the nature or extent of her injury-related condition or that she had been otherwise retrained or vocationally rehabilitated. She alleged generally that the 2001 wage-earning capacity determination was erroneous. In this case, the Office based the wage-earning capacity determination on appellant's actual earnings as a full-time modified distribution clerk, a position she accepted on May 13, 2001 and commenced as of May 19, 2001. Appellant's wages in the modified position equaled those she earned at the time of injury and the Office subsequently reduced her wage-loss benefits. On September 6, 2001 the Office found that she had been reemployed in the modified-duty position since May 19, 2001 at wages equal or greater to her date-of-injury job. The decision found that appellant's actual wages from the successful performance of the position fairly and reasonable represented her wage-earning capacity.

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<sup>7</sup> 5 U.S.C. § 8115(a). See *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent an employee's wage-earning capacity).

<sup>8</sup> See *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984); *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975).

<sup>9</sup> *D.M.*, 59 ECAB 164 (2007); *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>10</sup> *K.S.*, Docket No. 08-2105 (issued February 11, 2009); *George W. Coleman*, 38 ECAB 782 (1987).

<sup>11</sup> See *Selden H. Swartz*, 55 ECAB 272 (2004); *Jack E. Rohrbaugh*, 38 ECAB 186 (1986).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(5) (October 2005). See also FECA Transmittal No. 10-01 (issued October 5, 2009).

The Board notes that the Office's determination was consistent with section 8115(a) of the Act. It properly noted that appellant received actual earnings as a modified distribution clerk for a period of more than 60 days as she had worked in the position since May 19, 2001. The evidence does not reflect that the position was odd-lot, makeshift or seasonal in nature. Rather, the record reflects that but for intermittent periods of claimed wage loss, appellant successfully continued in the position until November 15, 2009, a period of over eight years. The record indicates that, as of that date, there was no work available within her medical restrictions and she filed a claim for wage-loss compensation.

Appellant has not established that the 2001 wage-earning capacity determination should be modified. She did not meet her burden of proof to establish that the Office's decision was erroneous. In *K.R.*, the Board noted that, as a formal wage-earning capacity determination was in place, the proper standard of review is not whether the employee sustained a recurrence of disability but whether the wage-earning capacity determination should be modified.<sup>13</sup> It stated:

“Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost. Therefore, the employing establishment's withdrawal of appellant's limited duty ... was immaterial. Appellant continued to have a capacity to earn wages. Absent a showing that the wage-earning capacity determination should be modified, she has no disability under the Act and is not entitled to compensation for wage-loss when light duty was withdrawn.”

In the present case, appellant's wage-earning capacity determination was in place when she was sent home. She did not meet her burden of proof to demonstrate that the existing wage-earning capacity decision should be modified. As noted, appellant did not contend there was a material change in her medical condition or that she had been retrained or vocationally rehabilitated. The record does not support her contention that the 2001 determination of wage-earning capacity was erroneous.

### **CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish that her wage-earning capacity determination should be modified.

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<sup>13</sup> See *K.R.*, *supra* note 7.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 17 and February 11, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 17, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board